

IN THE HIGH COURT OF JUDICATURE FOR FOR
RAJASTHAN AT JODHPUR

JUDGMENT

S.B. Civil Second Appeal NO. 63/90
Bajranglal Vs. Om Prakash & Ors.

Date of Judgment : 03.01.2007

under S. 100 CPC against the judgment and
decree of learned Addl. District Judge, Nagaur
Camp at Deedwanat dated 9.7.90

PRESENT
HON'BLE MR. PRAKASH TATIA, J.

REPORTABLE

BY THE COURT:

Mr. Rajendra Mehta)
Mr. D.R. Bhandari) for the appellant.
Mr. Arvind Samdariya for the respondents.

The appellant one of the judgment debtor in civil original suit
No. 165/1958 has preferred this appeal against the order dated
19.2.1988 passed by the Court of Civil Judge, Merta in civil misc.
Case No. 10/84 and against the appellate order dated 09.7.90 passed
in civil appeal No.

3/88 by which the appellate court dismissed the appeal of the defendant appellant.

The brief facts of the case are that one Malchand Modi filed suit for possession of the property in dispute on 28.11.1958 with the allegation that the plaintiff mortgaged his property on 4.5.53 for consideration of Rs. 4000/- to Chogalal and Bajranglal. Plaintiff's suit was dismissed by the trial court on 29.1.1962. Against this judgment and decree plaintiff preferred regular first appeal. The appellate court set aside the judgment and decree of the trial court dated 29.01.1962 and remanded the case back to the trial court. The trial again dismissed the plaintiff's suit by judgment and decree dated 23.12.1964. The plaintiff again preferred a regular first appeal against the trial court's judgment and decree dated 23.12.1964 which was allowed by the court of District Judge (CAD 13/1965) by judgment and decree dated 6.7.1967. The appellate court decreed the suit in following terms:

“ the result is that the appeal is accepted and the judgment and decree of the learned lower judge are reversed and the plaintiff is held to be adopted son of the deceased Meghraj and so a decree for possession of the two houses described in para No. 3 of the plaint and mortgaged with the defendants by Mst. Ladi is passed in favour of the plaintiff. He will however pay Rs. 4000/- and Rs. 2064/- as interest per annum to the date of the suit i.e. 28.11.1958 to the

defendants n all Rs. 6064/- and further the interest at the rate of 6% per annum from the date of suit till the payment on the original principal amount of Rs. 4000/- and on payment of this amount, the plaintiff shall be entitled to recover possession of the two mortgaged houses described in para NO. 3 of the plaint, with the iron safe and the title deeds given to the defendants at the time of mortgage by Smt. Ladi. As regard the costs of this litigation it is made easy through out as both plaintiff and the defendants have not put their respective claims in a straight forward manner and both were found true for one and wrong for other part of their claims. The court had to find out the truth placed in a covered manner by both the parties in their pleadings and reliance could be place on AIR 1954 TRANVANCORE COCHIN 152 – Veli Pillai Padakalingam V. Paramandan Yesudasan. This will also dispose of the cross objection filed by the respondents regarding their claim for the costs”.

(emphasis supplied)

It appears from the record that one application was submitted by the defendant respondent before the court of District Judge, Merta (in decided appeal NO. 13/1965) which was registered as civil Misc. Case NO. 6/68. This application was filed for correction in the judgment and decree passed by the appellate court because in the judgment and decree, the First Appellate Court did not fix the time for deposit of loan and interest amount by the decree holder for the mortgaged property. It appears that defendant's own contention was that since the appellate court has not fixed the time for payment of mortgage amount and interest, therefore, in case of default of plaintiff, the suit cannot be dismissed. The said contention of the

defendant respondent was rejected by the First Appellate Court. The defendant also requested that plaintiff be directed to make payment earlier. This prayer was also declined by the First Appellate Court and the First Appellate Court dismissed the defendant judgment debtor's application vide order dated 8.5.1969 certified copy of which has been placed on record by the present decree holder.

It appears that said Malchand, the original plaintiff decree holder through his power of attorney sold the mortgaged house referred above by the registered sale deed dated 4.10.1982 to the applicant Om Prakash who submit the application before the trial courts under Order 34 Rule 8 CPC and prayed that the Appellate Court's decree in favour of Malchand Modi was preliminary decree and the applicant is purchaser of the property therefore he may be permitted to deposit principle amount as well as interest in pursuance of the decree dated 6.7.1967. The said application was allowed by the court below and the applicant deposited the total amount of Rs. 11,824/-. The applicant also prayed that a final decree as provided under Order 34 Rule 8 CPC may be passed.

The applicant's application for final decree was opposed by the judgment debtor No. 1 Bajranglal now deceased. Judgment debtor Bajranglal submitted that the decree dated 6.7.1967 passed by the

First Appellate Court was not the mortgaged decree but was passed in a suit for possession. In view of the above, the decree dated 6.7.1967 is final decree and period for execution of decree has already expired therefore, the application filed by the applicant decree holder deserves to be dismissed. It was also submitted that on 4.10.1982 i.e. on the date of transfer of decree in favour of applicant by the decree holder, the decree dated 6.7.1967 was not executable and, therefore, the original plaintiff decree holder Malchand could not have transferred the decree in favour of the applicant. It is also contended that the sale deed was executed by Kesrimal S/o Chagan Lal in favour of applicant Om Prakash whereas said Kesrimal had no authority to execute the sale deed. It is also submitted that even if the decree dated 6.7.1967 is treated a mortgaged decree then the decree dated 6.7.1967 itself was final decree and was not preliminary decree.

The trial court dismissed the judgment debtor's objection and held that the decree dated 6.7.1967 is preliminary decree and was passed after holding that suit property was mortgaged by the plaintiff to Choga and Bajranglal, therefore, the applicant who stepped in shoes of plaintiff has right to execute the decree.

Following substantial questions of law were framed on 26.10.1993-:

- (1)“That learned Addl. District Judge was not correct in holding the decree dated 6.7.1976 passed by the learned Distt. Judge in Civil appeal NO. 13/65 to be a preliminary decree in the suit for redemption and it has further erred in holding that an application for passing a final decree for redemption was maintainable and it was within time.
- (2)That decree in dispute dated 6.7.67 passed by learned District Judge, Merta in Civil appeal NO. 13/65 was a mere decree for possession on payment ascertained amount mentioned therein, which has become barred by limitation under Article 136 of Limitation Act and was not capable of execution. Thus application under order 34 rule 8 was not maintainable and the learned Judge has erred in holding that was maintainable.
- (3)That even if it is consideration to be a redemption decree, it was final decree in suit for redemption, which also had become bared by limitation under Article 136 of Limitation Act and thus application under order 34 Rule 8 CPC was not maintainable.
- (4) That the learned Judge has misconstrued the alleged power of attorney executed in favour of Keshrimal by Mal chand and has erred in interpreting the work “ to be “ “ “ No authority was given to Keshir mal to sell the property in dispute or decree in dispute, and therefore, the alleged sale deed in favour of respondent NO. 1 Om prakash is absolutely void.”

Learned counsel for the appellant vehemently submitted that the plaintiff filed the suit for possession with specific pleading that the mortgage in question was void ab initio. The plaintiff also sought declaration that said mortgage may be declared null and void and decree for possession be passed in favour of plaintiff and, therefore, even if there is condition imposed in decree dated 6.7.1967 that the plaintiff shall pay Rs. 4000/- and interest thereon that will not change the nature of the suit and character of the decree passed by the Court. It is submitted that since decree was passed on 6.7.1967 and alleged sale deed was executed after 12 years i.e. after expiry of the period of

limitation for execution for the decree, therefore, no sellable right was with the original plaintiff which could have been transferred to the applicant. It is also submitted that the court below have misconstrued the power of attorney in favour of Kesrimal executed by Malchand and in fact Malchand never authorised kesrimal to sale the property in dispute to the applicant or to anybody.

Learned counsel for the respondents submitted that the decree provides that plaintiff shall pay Rs. 4000/- “ the mortgage amount” to the defendants alongwith interest and in the decree the First Appellate Court very specifically mentioned that after payment of the above amount for the mortgage property, the plaintiff's decree shall be entitled to take possession of the property as well as title documents from the defendant judgment-debtor. The decree dated 6.7.1967 has become final and not only this, the defendants themselves submitted application before the First Appellate Court for early payment of the secured mortgage amount which clearly shows that the defendants themselves treated the decree dated 6.7.1967 to be a decree passed for redemption of mortgage property. It is also submitted that the defendants judgment debtors have no right to raise questions which are pre decree matters.

I have considered the submissions of the learned counsel for

the parties and perused the record. The decree dated 6.7.1967, operative part of which has been quoted, clearly reveals that the First Appellate Court passed the decree on 6.7.1967 and decreed the suit of the plaintiff for two houses described in para 3 of the plaint and mentioned the property as mortgaged property with the defendants and directed the plaintiff to pay Rs. 4000/- and Rs. 2064/- as interest from the date of mortgage i.e. 4.3.1953 @ 9% per annum to the date of the suit i.e. 28.11.1958 to the defendants and the decree provided that the plaintiff shall further pay interest @6% per annum and on payment of above amount, the plaintiff shall be entitled to recover the possession of two mortgaged houses described in para 3 of the plaint and also shall be entitled to take title deeds from the mortgagees. The court specifically, because of the reason of frame of suit held that “the court had to find out the truth placed in a covered manner by both the parties in their pleadings and reliance could be place on AIR 1954 TRANVANCORE COCHIN 152 – Veli Pillai Padakalingam V. Paramandan Yesudasan.

In view of the above, it is clear that the decree is unambiguous and clearly though passed in a suit which was filed for possession of immovable properties by the plaintiff the court finding is that it is a case of recovery of possession of mortgage properties and consciously and specifically passed the decree for redemption of mortgage property, that decree has attained finality as not challenged

by the defendant judgment debtor on the ground that in the suit for possession, relief of redemption of mortgaged property was wrongly granted by the Court. The pertinent fact is that the defendants' own case throughout the litigation before the decree dated 6.7.1967 and thereafter also remained is that they are in possession of the property as mortgagees. The defendants even sought early payment by moving application before the First Appellate Court that was dismissed by the First Appellate Court vide order dated 8.5.1969. The substantial question of law NO. 1 & 2 so far it relates to nature of decree is concerned it is held that the decree dated 7.6.1967 is preliminary because of the further reason that the plaintiff mortgagee cannot be denied opportunity of getting time for depositing of the amount for redeeming the mortgage property and that right is given by the Order 34 Rule 7 CPC. It will be worthwhile to mention here that the defendant judgment debtors could have taken steps for passing final decree as per sub Clause (ii) of Sub Rule 1 of Rule 7 of Order 34 CPC. As per Sub Sec. (i) of Rule 8 of Order 34 CPC the decree holder can deposit the due amount till final decree debarring the plaintiff from all right to redeem the mortgaged property is passed by the Court. The applicant decree holder did so and deposited the amount in the trial court before any such final decree. In view of above substantial question of law No. 1 to 3 are decided against the appellant. The courts below rightly held that the decree in question is preliminary

mortgage decree.

Another ground raised by the appellant and for which substantial question of law No. 4 has been framed by the court that power of attorney executed by the original plaintiff Malchand was misread by the courts below. In power of attorney it is mentioned that the power of attorney holder shall have “all powers” and it has been clearly mentioned that power of attorney shall have authority to mortgage, sale or gift the property for any or philanthropy purpose. The power of attorney is required to be read meaningfully and words which have been used alongwith other words can be relevant for the purpose of finding out true meaning of the word. In view of the fact that word “Viya” has been mentioned alongwith words 'mortgatge' and gift which it clearly demonstrate that authority has been given to power of attorney holder to sale the property. Otherwise also how a immovable property can be used for transaction otherwise then by way of sale and mortgage etc. Which may be termed as “Viya”. In view of the above reasons, power of attorney clearly authorized the hold of power of attorney to execute the sale deed on behalf of the original plaintiff. In view of the above discussion, it is held that the decree dated 6.7.1967 preliminary decree and passed for redemption

of mortgage of the property in dispute and application for passing final decree has been filed within period of limitation.

The appeal is dismissed.

(PRAKASH TATIA), J.

ns.